graph 10 of the statement of claim contains an averment about the proposal that the sum of $74,000 be paid to Chung Khiaw Bank in partial redemption of the charge on behalf of the defendants or alternatively the said sum be released to them on their solicitor giving an undertaking to redeem the charge. When giving evidence, Mr Gan stated that the plaintiffs had not instructed him to use the sum of $74,000 paid by them to reduce the amount outstanding on the charge. This statement of Mr Gan implies that the said averment in para 10 of the statement of claim was his own idea and it was not made on the instruction of the plaintiffs.

It is clear from the evidence that the plaintiffs paid the instalment of $74,000 before the date on which it was due. It is also clear that Mr Gan received it on behalf of the defendants. Although Mr Gan refused to release the sum to the defendants, this does not mean that the plaintiffs had failed to pay when the instalment was due. The plaintiffs had nothing to do with Mr Gan's refusal and their position was not affected by it. Mr Gan had acted on his own and not on the instruction of the plaintiffs when he declined to pay. Mr Gan's refusal to pay was a matter between the defendants and their solicitor, Mr Gan. We do not wish to express any view as to whether Mr Gan had the right to refuse to pay over the sum to the defendants or to use it for the purpose of reducing the amount outstanding on the charge. That question is not the issue in this case.

It was submitted on behalf of the defendants that since the $34,000 cheque was an outstation cheque, it would take a few days to be cleared and therefore it cannot be said that the amount was paid on the due date. In our judgment, the answer to this point can be found in Mr Gan's evidence where he stated that there was an arrangement between him and the bank whereby it would credit his clients' account immediately without waiting for the clearance of the outstation cheque. Therefore we agree with the judge that the plaintiffs are entitled to specific performance of the agreement, although on different grounds.

This appeal is dismissed with costs, and the deposit should be paid out to the respondents (plaintiffs) on account of the costs.

Appeal dismissed.

Solicitors: *Nijar & Nijar*; *Ho Thian Cheh & Co.*

Reported by *Prof Ahmad Ibrahim*

Automobiles Peugeot SA v Asia Automobile Industries Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION NO D2-33-10-87
SITI NORMA YAAKOB J
4 AUGUST 1988

Companies and Corporations – Minority shareholder instituting proceedings against directors – Whether need to file derivative action – Whether derivative action would amount to duplicity of actions – Companies Act 1965, s 181(1), (2)

In this case, the second respondent raised objections to the petitioner's application to amend the petition by the addition of another prayer. The additional prayer sought to make the second respondent personally liable to pay damages to the first respondent for alleged breaches of his fiduciary duties as a director of the first respondent. The second respondent contended that the petitioner, being only a minority shareholder of the first respondent, cannot question acts done by him as the director of the first respondent for the reason that if a majority of the shareholders of the first respondent is in favour of what he has done, the petitioner's right to question such action no longer exists. The second respondent submitted that the petitioner had to file another writ by way of a derivative action.

Held, dismissing the objections: Since there is now statutory sanction (under s 181(1) and (2) of the Companies Act 1965) for a shareholder with a minority interest in a company to institute proceedings against directors conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner as that would amount to a duplicity of actions relating to the same subject matter.

Cases referred to
1 *Foss* v *Harbottle* (1843) 2 Hare 461; 67 ER 189 (not folld)
2 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (refd)

Legislation referred to
Companies Act 1965 s 181(1), (2)

Chua See Hua for the second respondent/appellant.
Loh Siew Cheong for the petitioner/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The only objection raised by the second respondent to the petitioner's application to amend the petition is the addition of another prayer to the petition that seeks to make him personally liable to pay damages to the first respondent for alleged breaches of his fiduciary duties as a director of the first respondent.

He questions the locus standi of the petitioner as he maintains that the proper plaintiff, in an action of any alleged wrong done by him to the first respondent should be the first respondent itself. Moreover, being only a minority shareholder of the first respondent, the petitioner cannot question acts done by him as the director of the first respondent for the simple reason that if a major-

ity of the shareholders of the first respondent is in favour of what he has done, the petitioner's right to question such action no longer exists. To get around this, the second respondent suggests that nothing short of the petitioner filing another writ by way of a derivative action will suffice in the circumstances of this case. By so pleading, the second respondent is in fact giving recognition to the rule in *Foss* v *Harbottle*.[1]

The injured party in this action is the first respondent and s 181(1) and (2) of the Companies Act 1965, under which this petition is presented and relief sought, was specially enacted to overcome the problem posed by *Foss* v *Harbottle*,[1] and to strengthen the position of the minority shareholders in limited companies. Since there is now statutory sanction for a shareholder with a minority interest in a company to institute proceedings against directors from conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner in the manner suggested by the second respondent as that would amount to a duplicity of actions relating to the same subject matter.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[2] the Privy Council held that under s 181(2) the courts have a wide and an unfettered discretion as to the reliefs they may grant which are in no way limited to those listed in sub-s (2)(a)-(e). Since a claim for a damages against the second respondent would be a natural consequence should the wrong acts complained of by the petitioner be established, I had concluded that the particular amendment objected to by the second respondent should not prejudice him in any way and that it is necessary in the circumstances to enable the court to determine the issues in dispute between the parties. To that end, I had affirmed the order of the senior assistant registrar allowing the petitioner's application to amend the petition and accordingly dismissed the second respondent's appeal with costs.

Order accordingly.

Solicitors: *Skrine & Co*; *Cheang & Ariff*.

Reported by *Ng Sheau Jiuan*

Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-1169-86
SITI NORMA YAAKOB J
27 JULY 1988

Contract – Guarantee – Guarantee executed after advance of credit facilities – Whether consideration was past – Whether guarantee was a continuing guarantee

Banking – Guarantee – Guarantee executed after advance of credit facilities – Whether consideration was past – Whether guarantee was a continuing guarantee

The third defendant, who was sued as a guarantor pursuant to two guarantees, applied to set aside a judgment in default entered against him. He contended that as the guarantees were executed after the credit facilities were advanced to the first defendant, they contained past consideration and as such were not enforceable against him. It was also submitted that the judgment in default was entered for sums in excess of that claimed in the statement of claim.

Held, dismissing the application: (1) A continuing guarantee, such as the one in this case, includes guaranteeing not only facilities existing at the time of execution of the guarantee but also facilities to be made in the future. As such, there is good consideration given to both the continuing guarantees.

(2) Clause 8 of both guarantees is a conclusive evidence clause, the effect of which is that any statement issued by the plaintiff as to the amount due from the first defendant is conclusive evidence of the third defendant's indebtedness as a guarantor. Such a statement was issued by the plaintiff wherein the principal sum stated is less than the total limits of the two guarantees.

(3) The third defendant's tardiness in pursuing his rights has greatly prejudiced the plaintiff as it had incurred expenses in executing the judgment. The application to set aside is therefore dismissed.

Cases referred to

1 *Heng Cheng Swee* v *Bangkok Bank Ltd* [1976] 1 MLJ 267 (folld)
2 *Chew Soon Tat* v *Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 (distd)
3 *Perwira Habib Bank Malaysia Bhd* v *Foo Ah Chai* 1987 BLD [Aug] 494 (distd)
4 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)

T Selvendranathan for the third defendant/appellant.
WM Chang for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: In his application to set aside a judgment in default entered against him on 31 December 1986, the third defendant, who is sued as a guarantor pursuant to two guarantees, raised the following issues to establish that he has a defence on the merits:

(1) The two guarantees contain past consideration and as such are unenforceable against him.